

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

31088

**FILE:** B-216712

**DATE:** April 26, 1985

**MATTER OF:** U.S. Materials Company

**DIGEST:**

1. Where agency contention that protester failed to submit a written, unconditional extension of its bid acceptance period is supported by apparently contemporaneous memoranda and the protester has failed to submit anything more than unsupported allegations to the contrary, protester has not met its burden of affirmatively proving its case.
2. Agency acted properly in canceling invitation for bids (IFB) where, as a result of unexpected administrative delays after bid opening, it became impossible for any bidder to meet the delivery schedule set forth in the IFB.

U.S. Materials Company (U.S. Materials) protests the cancellation of invitation for bids (IFB) No. 7PN-B-47562-1/H4/7SB, issued by the General Services Administration (GSA) for the supply of magnesium carbonate and potassium chlorate. GSA canceled the solicitation after unexpected administrative delays subsequent to bid opening rendered it impossible for any awardee to meet the delivery schedule set forth in the solicitation. GSA contends that U.S. Materials failed to submit a written, unconditional extension of its bid acceptance period, but instead insisted on a modification of the delivery schedule. U.S. Materials, on the other hand, maintains that it expressed a willingness to accept award under the solicitation by unconditionally extending its bid in writing and argues that GSA has improperly ignored a certificate of competency issued by the Small Business Administration (SBA) on behalf of U.S. Materials. ✓ (2)

We deny the protest.

GSA solicited bids on two items--item No. 1 for the supply of 45,000 pounds of magnesium carbonate and item No. 2 for the supply of 92,243 pounds of potassium chlorate. The solicitation required that the contractor make

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initial deliveries of 22,950 pounds of magnesium carbonate and 28,000 pounds of potassium chlorate by September 24, 1984, with subsequent deliveries to be made for both items by October 25, and for item No. 2 by November 26 and December 26. Bidders were requested to keep their bids open for 60 calendar days after bid opening. Two bids were received on May 15. After application to the other bid of a differential under the Buy American Act, 41 U.S.C. §§ 10a-d (1982), GSA found U.S. Materials bid to be low on both items.

On June 22, GSA requested that a preaward survey be conducted on U.S. Materials and its proposed subcontractor for item No. 1, Morton Chemicals Company (Morton). Since the scheduled date for return of the survey was July 25, more than 60 days after bid opening, GSA requested U.S. Materials to extend its bid acceptance period. GSA indicates that while U.S. Materials orally agreed to a bid extension on June 22, as well as to subsequent 30-day extensions on July 15 and August 15, it never confirmed these extensions in writing despite repeated requests from GSA and promises from U.S. Materials to do so. As for the other bidder, GSA reports that it had indicated an unwillingness to extend its bid.

Although the preaward survey indicated that Morton was capable of performing, the firm subsequently informed contracting authorities that it had not been asked by U.S. Materials for a commitment to act as a supplier should U.S. Materials receive the contract. In fact, Morton's representative stated that he was not even familiar with U.S. Materials. Moreover, the plant facilities report indicates that survey officials were unable to find U.S. Materials' plant and GSA reports that U.S. Materials failed to respond to repeated requests for necessary financial information. Accordingly, the preaward survey indicated that U.S. Materials was incapable of performing and the contracting officer determined that the firm was nonresponsible. ✓

Since U.S. Materials is a small business, the contracting officer, on August 9, referred the matter to the SBA, which, under 15 U.S.C. § 637(b)(7) (1982), has authority to determine the responsibility of small business concerns by issuing or refusing to issue a certificate of competency (COC). Apparently contemporaneous memoranda prepared by contracting officials indicate that an official

of SBA contacted GSA on September 14 to express SBA's concern as to the approaching September 24 deadline for initial deliveries under the solicitation and to inform GSA that the COC application would be evaluated on the basis of a delivery schedule different from that in the IFB, and under which the first deliveries would not be due until 70 days after receipt of notice of award, with subsequent deliveries due every 30 days thereafter. The contracting officer reportedly replied that GSA could not agree to SBA's proposed delivery schedule. Nevertheless, on September 20, SBA issued a COC certifying U.S. Materials' responsibility.

Although U.S. Materials, early on the morning of September 14, had orally agreed to extend its bid again and to confirm the extension in writing, later, when it was contacted by GSA following the contracting officer's discussion with the SBA official, U.S. Materials allegedly expressed reservations. An apparently contemporaneous GSA memorandum indicates that when asked about the delivery schedule "designed by him and SBA," the director of U.S. Materials--

"stated he could not meet the delivery schedule as cited in the IFB because it was too short and unfair to him. He went on to say that the alternate schedule would allow time for his suppliers to ship the raw materials to him. I [i.e., the contracting officer] informed him that the change in the delivery schedule could not be allowed because the IFB was formally advertised. However, the agency may be willing to slightly modify the delivery schedule by delaying the September date until sometime in November, but he should not have any trouble meeting the October 24 delivery date. Momentarily, he didn't think he would have any problems either, but added he needed to check with his suppliers."

According to GSA, U.S. Materials again promised to supply a written extension of its bid acceptance period and was warned that award could not be made without it.

GSA reports that the contracting officer telephoned U.S. Materials on the morning of September 20, informing the firm of SBA's issuance of the COC and specifying the

new delivery schedule. Under that schedule, the September 24 deliveries would be delayed until November, but the October and succeeding deliveries would remain scheduled substantially as before. According to an agency memorandum, the director of U.S. Materials responded that he was "uncertain as to whether or not he could meet the short delivery schedule," but promised to check with his suppliers and call back the same day with a definite answer as to whether he could meet the new schedule. The memorandum indicates that when the director of U.S. Materials agreed to extend its bid until October 15, promising to extend it in writing, the contracting officer reminded him that no award would be made without the written extension.

According to GSA, the contracting officer never received a written extension of U.S. Materials' bid. Nevertheless, in view of the urgent need for action in order to ensure timely deliveries and in expectation of finally receiving a written extension, the contracting officer decided to make award. Accordingly, by mailgram of September 20, she notified U.S. Materials in writing of the issuance of the COC and stated that "YOUR FOB DESTINATION OFFERED ON SOLICITATION 7PN-B-47562-1/H4/7SB IS ACCEPTED." She set forth in the mailgram a "RIGID DELIVERY SCHEDULE" which was the same schedule allegedly outlined to U.S. Materials that morning.

What appear to be contemporaneous agency records indicate that the contracting officer again telephoned U.S. Materials on September 26 to inquire as to whether U.S. Materials had contacted its suppliers and could meet the revised schedule. The director of U.S. Materials allegedly responded that he had been unable to reach his suppliers and then added that, in any case, GSA could not force him to meet the revised October 25 deadline for the first deliveries since he had a different agreement with SBA. GSA reports that when told that he would have to agree in writing to the new schedule "before an award could be issued," the director refused to acknowledge the September 20 mailgram in writing.

GSA accordingly canceled the solicitation on the ground that an agreement on the delivery schedule could not be reached. U.S. Materials thereupon filed this protest against the cancellation with our Office.

U.S. Materials disputes GSA's contention that U.S. Materials never extended its bid in writing, but instead only offered a qualified, oral extension based on delivery terms differing from those required by GSA. It indicates that the contracting officer did not ask for a written confirmation of bid extension until August 15. It claims that in response to this request and another made on September 14, U.S. Materials sent GSA a written extension of its bid on September 17. In support of its claim, U.S. Materials has submitted to our Office what appears to be the original of a handwritten letter to the contracting officer extending U.S. Materials' bid to October 31. Moreover, U.S. Materials denies that it ever suggested a delivery schedule differing from that set forth in the solicitation.

U.S. Materials maintains that since, in its view, it never qualified the extension of its bid acceptance period, it remained eligible for award. U.S. Materials therefore concludes that the subsequent cancellation of the solicitation in the face of the COC was improper.

We recognize that the record before us is not without uncertainties and inconsistencies calling into question the contentions of both parties. Thus, we note that while GSA denies ever having received the September 17 written bid extension which U.S. Materials alleges that it sent, the contracting officer, who had repeatedly warned U.S. Materials that receipt of a written bid extension was a precondition to award, issued a notice of award on September 20.

On the other hand, while U.S. Materials has submitted to our Office what appears to be the original of the purported September 17 extension, it has not provided any explanation as to why we and not the agency were sent the original, if it is indeed that. Likewise, while U.S. Materials argues that contracting officials have intentionally sought to delay this procurement in order to resolicit, we note that the September 20 notice of award was sent on the same day that SBA issued its COC. Further, while U.S. Materials denies that it ever suggested a modification of the delivery schedule as set forth in the solicitation, indicating that it believed that no one had authority to change the specifications, its version of events gives no indication that it expressed any concern as to how it could

initially deliver in Arkansas over 50,000 pounds of material to be sent from its plant in New York or from Morton's plant in Michigan when delivery under the solicitation was required by September 24.

We have previously held that when the only evidence is conflicting statements by the protester and the contracting agency, the protester has not met its burden of affirmatively proving its case. See Alchemy, Inc., B-207954, Jan. 10, 1983, 83-1 C.P.D. ¶ 18; Arsco International, B-202607, July 17, 1981, 81-2 C.P.D. ¶ 46. Accordingly, we believe that on balance, U.S. Materials has failed to carry its burden of demonstrating that GSA's summary of events, supported by apparently contemporaneous written memoranda prepared by contracting officials, is other than substantially accurate. Under these circumstances, cancellation of the solicitation was appropriate.

The extension of a bid acceptance period does not transform an advertised procurement into a negotiated procurement. See King-Fisher Company, B-216284, September 24, 1984, 84-2 C.P.D. ¶ 338. Thus, we have held that where a bidder qualifies the extension of its bid acceptance period by conditioning it upon a change in a material term of its offer, such as price, that bidder is ineligible for award. See S.J. Groves & Sons Company, B-207172, Nov. 9, 1982, 82-2 C.P.D. ¶ 423; Steenmeyer Corporation, 61 Comp. Gen. 384 (1982), 82-1 C.P.D. ¶ 445; Klein Construction Company, B-201599, Mar. 2, 1981, 81-1 C.P.D. ¶ 158; Murphree & Lisle, Inc., B-198210, July 18, 1980, 80-2 C.P.D. ¶ 236; but cf. AGP/GENTech Inc., B-216268, Dec. 17, 1984, 84-2 C.P.D. ¶ 674 (sole bidder for item). Even if an agency is willing to award a contract whose material terms are at variance with the IFB, such an award would be improper since the award of a contract pursuant to the advertising statutes must be made on the same terms as offered to all bidders. See CRF-A Joint Venture, Etc. v. United States, 624 F.2d 1054 (Ct. Cl. 1980); Mid-South Electric Co., Inc., B-213894, June 14, 1984, 84-1 C.P.D. ¶ 628.

Moreover, the integrity of the competitive bidding system also precludes an agency from awarding a contract competed under given specifications with the intent of changing to materially different specifications. See Intercomp Company, B-213059, May 22, 1984, 84-1 C.P.D. ¶ 540.

We have already alluded to the situation facing the contracting officer when notified on September 20 of the issuance of the COC, that is, the inconsistency in awarding a contract with the solicitation delivery schedule when that schedule required delivery to a distant location within 4 days of over 50,000 pounds of material. The inherent improbability of a timely delivery under the solicitation delivery schedule had become an impossibility by September 26 when the contracting officer learned of U.S. Materials' unwillingness to meet the delivery terms communicated to it 6 days earlier.

We therefore believe that since, as a result of unexpected administrative delays after bid opening, the specifications had become inadequate because it was impossible for any bidder to meet the delivery schedule set forth in the solicitation, cancellation of the solicitation was appropriate. See 53 Comp. Gen. 92 (1973); FAR, 48 C.F.R. §§ 14.404-1(c)(1) and (2).

The protest is denied.

*Harry R. Van Cleve*  
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General Counsel